In the Supreme Court of the United States

OCTOBER TERM, 1972

No.

UNITED STATES OF AMERICA, PETITIONER

v.

JACK ROBERTS, ET AL.

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLES BISHOP SMITH, ET AL.

UNITED STATES OF AMERICA, PETITIONER

v.

JEROME LEAVITT and NORMAN SHABAS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Seventh Circuit in these three cases.[1]

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[1] This petition concerns three related cases which were treated together in the Court of Appeals under Seventh Circuit docket numbers 72-1637, 72-1514 and 72-1729. In the

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is not yet reported. The opinions of the district court in the *Smith* case (App. B, *infra*) and in the *Leavitt* case (App. C, *infra*) are not reported. The district court in the *Roberts* case wrote no opinion.

JURISDICTION

The judgments of the court of appeals were entered on April 3, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the procedures followed within the Department of Justice in authorizing applications for wiretap orders were sufficient to comply with Title III of the Omnibus Crime Control and Safe Streets Act of 1968.

2. Whether, if the authorization to apply for these wiretap orders was not sufficient, suppression of the evidence obtained from the wiretaps is required.

3. Whether, when the Attorney General personally authorized the submission of wiretap applications to the district court, the fruits of the court-approved interceptions must be suppressed on the ground that

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district court, while the cases were considered separately, the court in No. 72-1514 followed the earlier ruling in No. 72-1637, and the court in 72-1729 suppressed the wiretap evidence as the progeny of the wiretaps involved in No. 72-1637. See Rule 23(5) of this Court's rules.

the court orders are the progeny of earlier wiretaps made under court orders resulting from applications authorized on behalf of the Attorney General by his Executive Assistant.

STATUTES INVOLVED

The relevant statutory provisions are set forth in Appendix D, *infra*.

STATEMENT

The defendants in these three cases were charged in two separate indictments with conducting an illegal gambling bsuiness in violation of 18 U.S.C. 1955. The defendants in the *Roberts* and *Smith* cases were also charged with making interstate telephone calls with the intent to promote and carry on an unlawful gambling business in violation of 18 U.S.C. 1952. In each case, the defendants filed motions to suppress evidence obtained by wire interceptions under court orders. The defendants challenged the procedure used by the Department of Justice in authorizing the submission of the application for the wire interception order to the court. The government opposed these motions and filed affidavits similar to those filed in *United States* v. *Giordano*, No. 72-1057, this Term, certiorari granted, March 26, 1973, describing the procedure followed.

1. In the *Roberts* and *Smith* cases, the evidence was obtained from a wire interception court order of October 8, 1970, and an extension of that order issued on November 3, 1970. The applications for each of these orders were submitted to the court pursuant

to the Department of Justice procedure detailed in our petition for certiorari in *Giordano*. In each instance, the Executive Assistant to the Attorney General authorized the applications on behalf of the Attorney General. In suppressing the evidence in the *Smith* case, the district court, relying on *United States* v. *Robinson*, 468 F. 2d 189 (C.A. 5), concluded that this authorization procedure was defective. Thereafter, a second district judge, following the earlier ruling of the same court, suppressed the evidence in the *Roberts* case.

2. In the *Leavitt* case, the two interception requests involved were personally approved by the then Attorney General, John N. Mitchell (on December 14, 1970 and January 15, 1971) for submission to the district court. These applications contained facts showing probable cause which derived in part from evidence obtained from the prior court-authorized wiretaps in the *Smith* and *Roberts* cases. In suppressing the evidence here, the district court did so because "[s]ome or all of the wiretaps were the progeny of the wiretaps found to be illegal" in the *Smith* case.[2]

3. On appeal, the court of appeals affirmed. As to the *Smith* and *Roberts* wiretaps, it relied on the opinion of the Fourth Circuit in *Giordano*, and con-

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[2] The district judge suppressed the evidence as to defendants Leavitt and Shabas who had been overheard on the earlier *Smith* wiretap. As to the other defendants in the *Leavitt* case who had not been overheard, the district court denied suppression on the ground that they lacked standing (App. C, 30).

cluded that the statute empowered only the Attorney General or a specifically designated Assistant Attorney General personally to authorize wiretap applications.

As to the *Leavitt* wiretap, it agreed with the district court that they were the progeny of the wiretaps involved in *Smith*, and were therefore properly suppressed. It pointed out that "the basis for exclusion is the statutory mandate that evidence derived from an illegal wiretap be suppressed and not a judicially fashioned exclusionary rule or 'fruit of the poisonous tree' doctrine" (App. A, 17). It concluded that with the granting of the suppression motion in *Smith*, 18 U.S.C. 2515 and 2518(10)(a) require that "the contents of the wiretap 'or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter,'" (App. A, 16-17) and that under existing law the *Leavitt* wiretap derived from the *Smith* wiretap.

REASONS FOR GRANTING THE WRIT

1. This is another in the series of cases pending before this Court on petitions for writs of certiorari involving issues closely related to those presented in *United States* v. *Giordano*, No. 72-1057, certiorari granted, March 26, 1973.[3] The first two questions—whether the procedures followed were sufficient to comply with the wiretap statute and whether, if the

[3] The decision below is consistent with the Fourth Circuit's decision in *Giordano*, with the Ninth Circuit's holding in *United States* v. *King*, petition for a writ of certiorari pending, No. 72-1320, and with the District of Columbia Circuit's

authorization procedures were insufficient, suppression is required—are before this Court in *Giordano*.

2. The third question presented—whether the wiretaps personally authorized by the Attorney General in the *Leavitt* case should be suppressed on the ground that they derived from the *Smith* wiretaps authorized by his Executive Assistant—is a variation of an issue presented in *Giordano*.[4] There the extension application was personally authorized by the Attorney General, and even if all the facts derived from the initial wiretap order (based on an application authorized by his Executive Assistant) were excised, there would still have been probable cause to issue the extension order. Here, in contrast, as the courts below found, the orders permitting the *Leavitt* wiretaps were based on applications which relied extensively on information obtained from the *Smith* wiretaps.

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opinion in *United States* v. *Mantello*, petition for a writ of certiorari being filed simultaneously with this petition. It is inconsistent with decisions of the Second Circuit in *United States* v. *Pisacano*, petition for certiorari pending, No. 71-1410, and *United States* v. *Becker*, petition for a writ of certiorari pending, No. 72-158. To the extent that it indicates that the procedures followed when the Attorney General personally authorized the wiretap in *Leavitt* were in substantial compliance with the statute, even though the memorandum appeared to delegate to the Assistant Attorney General the responsibility for authorizing the application, the decision below conflicts with the Ninth Circuit's decision in *United States* v. *Chavez*, petition for a writ of certiorari pending, No. 72-1319.

[4] The same issue is also presented in *United States* v. *Mantello*, petition for certiorari being filed simultaneously with this petition, to review the decision of the District of Columbia Circuit.

But the fact that the *Leavitt* wiretap applications derived from the *Smith* wiretaps, does not, we submit, warrant suppression of the former wiretaps even if the latter are suppressed. Both were carried out in compliance with court orders which were issued on adequate showings of probable cause, and the *Leavitt* wiretaps had the personal approval of the Attorney General. To require suppression on the ground that the *Leavitt* wiretaps were, ultimately, derived from the *Smith* wiretaps would be a harsh and inappropriate application of an exclusionary rule because of a mistake in the procedure followed by the Department of Justice and not because of a violation of constitutional magnitude.

Moreover, upholding this ruling would have a drastic effect on a great many cases.[5] To suppress the evidence obtained, not only from all wiretaps in which the applications were authorized by the Attorney General's Executive Assistant but also from all other wiretaps in which the applications for the court order were based on information obtained from such wiretaps, would frustrate the main purpose of the wiretap statute: the need to combat organized crime (see the Congressional Findings in Section 801 of Title III). Since applications for wiretap orders frequently rely on information obtained from previously authorized wiretaps, the exclusionary rule

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[5] Appendix E of the *Giordano* petition sets forth the pending cases in which the issue of the validity of wiretap applications authorized by the Executive Assistant to the Attorney General has been raised.

adopted by the court below would invalidate a substantial number of wiretaps based on applications submitted even after the Department of Justice revised its proceedings in November 1971. Furthermore, the identification of which particular wiretaps were invalid would require delving into the history of the authorization procedures, not only of the application for that wiretap, but also of all previous related applications. At the very least, this would substantially complicate trial of all cases involving court authorized wiretaps for several years. Such a result would not be "[a] sensible way of dealing with such a situation—fair to the intendment of [the wiretap statute] but fair also to the purposes of the criminal law." *Nardone* v. *United States*, 308 U.S. 338, 341.

The court below, however, concluded that suppression of derivative wiretaps was required by the Act (App. A, 17). There is no reason to suppose that Congress intended such a result to follow from a procedural mistake, when the application itself establishes probable cause. The suppression provisions of Title III, 18 U.S.C. 2515 and 2518(10)(a) were intended only to reflect existing law, and were not designed to expand the scope of the suppression rule beyond present search and seizure law. S. Rep. No. 1097, 90th Cong., 2d Sess., 1, 96.* Noth-

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*The concurrent enactment of Title II of the Omnibus Crime Control and Safe Streets Act of 1968, designed to facilitate the admissibility of confessions and of eye witness testimony (18 U.S.C. 3501, 3502), is also an indication that Con-

ing in the history of the statute indicates that Congress anticipated the problem involved here. In such circumstances, there is no more reason to impute to Congress an intent to require suppression than there is to apply the "fruit of the poisonous tree" doctrine. In short, even if there is a defect in the *Smith* wiretaps themselves meriting suppression of the evidence obtained therefrom, it is not appropriate to suppress evidence from subsequent related wiretaps, otherwise valid, as "the progeny of illegal wiretaps."

CONCLUSION

Because of the explicit conflict among the circuits and the substantial practical importance of the issues, this petition for a writ of certiorari should be granted. Since one of the issues presented—whether 18 U.S.C. 2515 requires the suppression of derivative wiretaps—involves a different facet of the problem presented in *Giordano*, the Court may wish to grant certiorari in this case and hear it with *Giordano*.

Respectfully submitted.

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APRIL 1973.

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gress did not at the same time intend to move in the opposite direction by expanding the traditional search and seizure exclusionary rule in Title III, the wiretap provisions.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1972 JANUARY SESSION, 1973
Nos. 72-1514, 72-1637, 72-1729, 72-1799

UNITED STATES OF AMERICA, APPELLANT

v.

JACK ROBERTS, ET AL., APPELLEES,
CHARLES BISHOP SMITH, ET AL., APPELLEES,
JEROME LEAVITT and NORMAN SHABAS, APPELLEES

UNITED STATES OF AMERICA, APPELLEE

v.

MICHAEL POSNER, APPELLANT

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division

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No. 71 CR 790
RICHARD W. MCLAREN, *Judge*

No. 71 CR 852
FRANK J. MCGARR, *Judge*

No. 71 CR 864
THOMAS R. MCMILLEN, *Judge*

No. 71 CR 290
RICHARD B. AUSTIN, *Judge*

ARGUED JANUARY 11, 1973—DECIDED APRIL 3, 1973

Before SWYGERT, *Chief Judge*, KILEY and CUMMINGS, *Circuit Judges.*

PER CURIAM. These appeals involve the question whether motions to suppress the content of intercepted telephone communications should have been granted in these four cases. Numerous persons were indicted for conducting an illegal gambling business in violation of 18 U.S.C. § 1955 and making related interstate telephone calls in violation of 18 U.S.C. § 1952.[1] The defendants filed motions to suppress evidence obtained by court-ordered wire interception. In part, the motions challenged the procedure used by the Department of Justice in authorizing the submission of the applications for the wire interception orders to the court. In Nos. 72-1514, 72-1637, and 72-1729, the motions to suppress were granted, and the Government appeals therefrom pursuant to 18 U.S.C. §§ 3731 and 2518(10)(b).[2] In No. 72-1799 the district court denied the motion to suppress, whereupon the defendant Michael Posner entered a plea of guilty, specifically reserving, however, the right to appeal the denial of his motion to suppress. This reservation of his right to appeal on a non-jurisdictional ground was made on agreement with the prosecutor and with the acquiescence of the trial court, and defendant Posner is now appealing pursuant to the reservation.

The applicable statute, 18 U.S.C § 2516(1), provides in pertinent part that "The Attorney General,

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[1] In No. 72-1799 the indictment was for a conspiracy to violate 18 U.S.C. § 1952.

[2] In No. 72-1637, the notice of appeal was filed within 30 days of the district court's denial of the Government's motion to reconsider. The notice of appeal was timely filed. See *United States* v. *Healy*, 376 U.S. 75, 77-80.

or any Assistant Attorney General specifically designated by the Attorney General, may authorize an application to a Federal judge" for an order authorizing the interception of oral or wire communications by the FBI in certain instances. In Nos. 72-1514 and 72-1637, Attorney General Mitchell did not authorize or designate an Assistant Attorney General to authorize these applications. The authorizations in question were made by Sol Lindenbaum, Executive Assistant to the Attorney General, who affixed the Attorney General's initials as per the latter's standing grant of authority to act when he was unavailable.[3] Mr. Lindenbaum concluded from his "knowledge of the Attorney General's actions on previous cases that he would approve the request if submitted to him." For the reasons persuasively stated by Judge Sobeloff in *United States* v. *Giordano*, 469 F. 2d 522 (4th Cir. 1972), certiorari granted, 41 U.S. Law Week 3516,[4] we conclude that the statute empowered only the Attorney General or a specially designated Assistant Attorney General—both of whom, in contradistinction to Mr. Lindenbaum, are subject to the political process of Senate confirmation—personally to authorize such applications.

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[3] The internal Justice Department procedure followed here is set forth in *United States* v. *Pisacano*, 459 F.2d 259, 263 (2d Cir. 1972), and *United States* v. *Giordano*, 469 F.2d 522, 525-526 (4th Cir. 1972), certiorari granted, 41 U.S. Law Week 3516.

[4] See also *United States* v. *Robinson*, 468 F.2d 189 (5th Cir. 1972), remanded for an evidentiary hearing to determine whether the wiretap applications were properly authorized under 18 U.S.C. § 2616(1) —— F.2d —— (5th Cir. Jan. 16, 1973; *en banc*); *per contra*, see *United States* v. *Pisacano*, 459 F.2d 259 (2d Cir. 1972); *United States* v. *Becker*, 461 F.2d 230, 235-236 (2d Cir. 1972).

When Mr. Lindenbaum initially authorized the applications, he affixed the Attorney General's initials to memoranda addressed to Assistant Attorney General Will Wilson stating that "[p]ursuant to the powers conferred on me by Section 2516 of Title 18, United States Code, you are hereby specially designated to exercise those powers for the purpose of authorizing David M. Quinn to make the above-described application." Mr. Wilson, however, did not personally authorize the application, but delegated to Deputy Assistant Attorneys General the authority to sign his name to letters of authorization for attorneys in the field. This is exactly what they did. Had the initial authorization actually been made by the Attorney General (or a specially designated Assistant Attorney General), we would agree with the Government that the purported "special designation" of Mr. Will Wilson was really not that contemplated by the statute (the Attorney General never exercised this statutory prerogative) but a delegation to perform a ministerial function, which the Assistant Attorney General could subdelegate.[5] Moreover, although the applications submitted to the trial judge identified Assistant Attorney General Will Wilson as the authorizing officer specially designated by the Attorney General, we would not be inclined to elevate form over substance to find a violation of 18 U.S.C. § 2518 (1)(a) and (4)(d), requiring the identity of the authorizing officer be transmitted to the court if there had been an initially proper authorization.[6] However, the fact is simply that in Nos. 72-1514 and

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[5] *United States* v. *Casale*, 467 F.2d 647, 651 (3d Cir. 1972); *United States* v. *Cox*, 462 F.2d 1293, 1300 (8th Cir. 1972); *United States* v. *Becker*, 461 F.2d 230, 235 (2d Cir. 1972).

[6] See cases cited in note 5, *supra*.

72-1637 there was no proper authorization at all; neither the Attorney General nor any Assistant Attorney General specially designated by the former authorized the wiretap applications. Therefore, the Government's arguments against finding a violation are founded on a non-existent premise and are unavailing.

Finally, as in *Giordano*, *supra*, the Government argues that even if there were "technical errors in the procedure used," the "drastic remedy of suppression of evidence" is unwarranted. Were it ours to decide whether or not judicially to fashion a rule of exclusion in this circumstance, we might agree with the Government. However, 18 U.S.C. §§ 2515 and 2518 (10) (a) are patently clear in expressing the Congressional judgment that these intercepted communications may not be received in evidence.[7] *United States*

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[7] 18 U.S.C. § 2515 provides:

"Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter."

18 U.S.C. § 2518(10) (a) provides in pertinent part:

"Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

[Footnote continued on page 16]

v. *Giordano, supra* at 531. Therefore, the motions to suppress were properly granted in Nos. 72-1514 and 72-1637.

In No. 72-1729, the Attorney General personally approved the wiretap applications. However, Judge McMillen held that the wiretap evidence as to Leavitt and Shabas must be suppressed because the wiretaps were the progeny of the illegal wiretaps involved in No. 72-1637.[8] We agree. 18 U.S.C. § 2515 provides that "no evidence derived" from any intercepted wire or oral communication "may be received in evidence in any trial * * * if disclosure of that information would be in violation of this chapter." Implementing that Section, 18 U.S.C. § 2518(10)(a) provides that any aggrieved person may move to suppress "evidence derived" from an unlawfully intercepted communication, and if the motion is granted the contents of the wiretap "or evidence derived therefrom, shall

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[7] [Continued]

"(i) the communication was unlawfully intercepted;

"(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

"(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter."

[8] We need not pass on the propriety of granting Shabas' motion on the additional ground that he was not mentioned by name in either order authorizing the wiretaps. But see *United States* v. *Kahn*, —— F.2d —— (7th Cir. 1972).

be treated as having been obtained in violation of this chapter." Taken together, these Sections required Judge McMillen to grant the motions of Leavitt and Shabas because the Government admitted that they were both overheard on the properly suppressed *Smith* wiretaps (in No. 72-1637) which prompted the wiretap applications in No. 72-1729. Once again, the basis for exclusion is the statutory mandate that evidence derived from an illegal wiretap be suppressed and not a judicially fashioned exclusionary rule or "fruit of the poisonous tree" doctrine arrived at by balancing the respective interests involved. While the statutory command may not be read to press the scope of suppression beyond that existing under present search and seizure law, the statute embodies the decision to suppress unlawfully obtained interceptions and evidence derived therefrom. We think it no unusual extension of the scope of suppression under existing law to conclude that the wiretap evidence in No. 72-1729 was derived from the *Smith* wiretap.[9]

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[9] *Smith* v. *United States*, 324 F.2d 879 (D.C. Cir. 1963), certiorari denied, 377 U.S. 954, on which the Government relies, is not analogous. There the court properly held that testimony of an eyewitness to a crime need not be suppressed because the police had learned his identity from defendants during their illegal detention. Here Leavitt's and Shabas' private communications were invaded by wiretaps which emanated from the earlier illegal ones, and the contents of these communications were sought to be used against them. As then Judge Burger pointed out in *Smith*, even though the source of the witness' identity was tainted, "[t]he fact that the name of a potential witness is disclosed to police is of no evidentiary significance, per se, since the living witness is an individual human personality whose attributes of will, perception, memory and volition interact to determine what testimony he will give. The uniqueness of this human process

In No. 72-1799, involving Michael Posner, the last of the seven Detroit and Chicago wiretap orders was illegal because the interception authorization was signed by Mr. Lindenbaum instead of by the Attorney General or a specially designated Assistant Attorney General. The Government admits that some of the information supporting the first Chicago wiretap order application was obtained from the four Detroit court-authorized wiretaps. Three of those interception authorizations were signed by the Attorney General. The Government proved that the remaining one (dated April 3, 1970) was telephonically approved by the Attorney General; that satisfied Section 2516(1).[10] Therefore, only the evidence obtained from the final Chicago wiretap was subject to suppression. The district court must now decide if the evidence obtained from the six legal orders supported the guilty plea of Posner apart from evidence obtained through the illegal order of June 5, 1970. If so, his conviction will stand.

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distinguishes the evidentiary character of a witness from the relative immutability of inanimate evidence." *Id.* at 881-882 (footnotes omitted). However, overhearing Leavitt and Shabas on the unlawful wiretaps was not without evidentiary significance; indeed those interceptions gave rise to probable cause for the wiretaps order directly against those defendants. Moreover, the utterances of the defendants themselves cannot be equated with the testimony of an occurrence witness.

[10] *United States* v. *Pisacano*, 459 F.2d 259, 263 (2d Cir. 1972).

Orders in Nos. 72-1514, 72-1637, and 72-1729 affirmed. In No. 72-1799 the judgment is reversed and remanded for further proceedings consistent herewith.[11]

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[11] Since the constitutionality of Title III of the Omnibus Crime Control Act was not raised below as a ground for suppression, we decline to consider it. See *United States* v. *Wright*, 466 F.2d 1256, 1259 (2d Cir. 1972).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 71 CR 852

UNITED STATES OF AMERICA, PLAINTIFF

v.

CHARLES BISHOP SMITH, ET AL., DEFENDANTS

MEMORANDUM OPINION AND ORDER

Defendant have filed a motion to suppress the contents of intercepted wire communications. As the facts in the instant case are identical to those in the recent case of *United States* v. *Robinson*, —— F.2d —— (5th Cir. January 12, 1972), and as our Seventh Circuit Court of Appeals has not yet spoken on this issue, we feel compelled to follow the *Robinson* case.

Therefore, defendants' motion to suppress the contents of the intercepted wire communications and any and all evidence derived therefrom is granted.

ENTER:

/s/ Frank J. McGarr
United States District Judge

DATED: March 7, 1952

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 71 CR 864

UNITED STATES OF AMERICA

vs.

SALVATORE GIBBELINA, HERBERT BLITZSTEIN, JEROME LEAVITT, SHERMAN GOLDMAN, NORMAN SHABAS, IRVING ANCELL, LEONARD LAZAR, MAURICE WEISS, NORMAN RUBIN, JEROME SOLKOWITZ, ALVIN WEISMAN, MORTAN SHAPIRO, MICHAEL POSNER, RICHARD REED, RONALD POLO.

ORDER

This cause comes on to be heard on several motions filed by the numerous defendants and on the memoranda of the parties filed in connection with the motions. The substantive motions have been joined in by most, if not all, of the defendants. The procedural motions will be ruled on as though they apply to all defendants, to avoid the filing of additional motions.

Motions to dismiss on grounds of unconstitutionality of 18 U.S.C. § 1955. This statute, enacted in 1970, punishes the principals who engage in gambling businesses involving five or more persons operating in excess of thirty days or with revenue of $2,000 or more a day. It was obviously drafted to prosecute relatively large scale gambling on the theory that this has an adverse effect on interstate commerce.

Such legislation is valid under the Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3), even though it might also affect intrastate activities or duplicate some local enforcement powers. *Perez* v. *United States*, 402 U.S. 146 (1971).

The contention that individual trivial cases may not be embraced within a properly defined class of activities has been case aside in Commerce Clause cases. E.g., *Maryland* v. *Wirtz*, 392 U.S. 183 (1968). Furthermore the indictment herein charges an illegal gambling business which continued in excess of thirty days *and* with gross revenue exceeding $2,000 on one day. The court will apply the indictment in the conjunctive, as written. This takes this particular case out of the casual intrastate poker game class.

Without regard to the recitation in the legislative history and the Title of the Act that this activity constitutes "syndicated gambling" and with no evidence other than the findings in the preamble of the statute (§ 801 of Title VIII, Part A "Special Findings"), the court finds that this statute is based on a reasonable classification and is a rational method of dealing with an undesirable burden on interstate commerce. *Heart of Atlanta Motel, Inc.* v. *U.S.*, 379 U.S. 241 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964). The presumption that the alleged crime burdens commerce is completely defensible. Many other trial courts have reached the same conclusion, even in the wide-open spaces. *United States* v. *Harris*, 332 F. Supp. 315 (N.D. Tex. 1971).

Motions to dismiss on grounds that the indictment is vague, indefinite and duplicitous. The indictment is clear and reasonably unambiguous. *United States* v. *Kahn*, 381 F.2d 824 (7th Cir. 1967), *cert. den.* 389 U.S. 1015 (1967). Since the indictment is

limited to activities in the Northern District of Illinois between October 15, 1970, and March 10, 1971, defendants are amply protected against double jeopardy. *Russell* v. *United States*, 369 U.S. 749 (1962).

Furthermore the indictment is not duplicitous. It charges only one offense, albeit that offense by definition must extend over more than thirty days. So, often, does a conspiracy, among other things. The government has alleged a single illegal enterprise in this indictment, "an illegal gambling business," and its evidence will be limited to that one enterprise. No defendant can be convinced under this indictment except by proof that he engaged in the specific business alleged, and once this case is concluded, no defendant can be tried again for this particular offense. Cf. *Cohen* v. *United States*, 378 F.2d 751, 754 (9th Cir. 1967) *cert. den.* 389 U.S. 897 (1967).

This is not to say, however, that the defendants are not entitled to more detailed specification of the particular illegal business covered by this indictment. This will be discussed below.

Motion of defendant Maurice Weiss to dismiss for lack of a preliminary examination. This motion is denied. A preliminary hearing is not required before an indictment is returned. The proceedings before the Grand Jury suffice for a determination of probable cause. See *Jaben* v. *United States*, 381 U.S. 214, 220 (1965). F.R.Cr.P. 5(c) applies to prosecutions other than by indictments.

Motions to dismiss the indictment because based on improper wiretapping, and motions to suppress evidence based on illegal wiretaps. The indictment itself does not refer to wiretapping, and the motion to dismiss on this ground is denied. It is apparent from the government's evidentiary disclosures, however,

that the indictment resulted in whole or in part from wiretap evidence obtained pursuant to 18 U.S.C. § 2510 *et seq.*, enacted in 1968. Therefore the legality of the procedures used to obtain this evidence are no doubt crucial to the case. The motions to suppress raise this issue.

The constitutionality of the wiretapping statute is dependent upon *Berger* v. *State of New York*, 388 U.S. 41 (1967). So far as we know, the statute has been upheld by every court which has considered the matter to date, including at least one Court of Appeals (*United States* v. *Cox*, 449 F.2d 679 (9th Cir. 1971)). It was also considered and enforced by the undersigned in *United States* v. *Kahn*, 71 CR 174 (Nov. 1971), now on appeal (7th Cir. #71-1931). We believe the wiretapping statute is constitutional when applied as limited hereinafter.

The court has examined all of the legal formalities by which the wiretaps were authorized but has not read the transcripts. Therefore the following rulings on defendants' motions to suppress the wiretap evidence will necessarily be somewhat abstract in the expectation that the parties can apply the rulings to each individual defendant's case.

Defendants contend that the wiretaps were not properly authorized. They now concede, however, that the authorizations were personally approved and initialed by the Attorney General of the United States on December 15, 1970 and January 15, 1971. His initials are on the Interception Order Authorizations bearing those two dates, and the defendants have had the original initialed documents authenticated by their own handwriting expert. Based on the affidavits filed herein and the defendant's admissions in open court, there is no further doubt that these two au-

thorizations were issued as required by 18 U.S.C. § 2516(1). Disting. *United States* v. *Robinson*, —— F.2d —— (5th Cir. #71-1058, Jan. 12, 1972).

Attorney General Mitchell's first authorization, dated December 14, 1970 related to designated telephones for the purpose of investigating possible violations of 18 U.S.C. § 1955 by defendants Gibbelina, Leavitt, and "others as yet unknown." Following this, an intervening authorization was sent by a Deputy Assistant Attorney General to a United States Attorney in Chicago. This is not a statutorily required step and was ministerial, not objectionable. Next, a Special Agent of the F.B.I. executed the required affidavit of probable cause, and a court order was obtained on December 15, 1970 in Case No. 70 C 3135 of the Northern District of Illinois, Eastern Division.

Although the affidavit is extremely prolix and contains much material unrelated to the indictment, it is not quite the equivalent of a general warrant. Disting. *Camara* v. *Municipal Court of the City and County of San Francisco*, 387 U.S. 523 (1967). The court therefore finds that the affidavit and the resulting court order are in conformity with Section 2518, and all communications intercepted pursuant to the Order Authorizing Interception of Wire Communications are lawful, if the persons named in the court order were talking. If the "unknown" persons were the only ones involved in a conversation, however, the court suppresses and evidence of such conversations, as to any defendant then on the telephone, or who owned or leased the premises.

This court is of the opinion that Section 2518 should be limited to the interception of conversations of specific individuals and not be used to intercept all

conversations on specific telephones. Cf. *United States* v. *Vega*, 52 F.R.D. 503 (E.D.N.Y. 1971). Section 2518(3)(a) requires the enabling judge to determine that there is "probable cause for belief that an individual is committing . . . a particular offense," and Section 2518(4)(a) requires the order to specify "the identity of the person, if known, whose communications are to be intercepted." Inasmuch as this statute follows *Katz* v. *United States*, 389 U.S. 347 (1967), it must be taken to apply to surveillance of persons, not telephones. A general invasion of all conversations on designated telephones is not proper under the Fourth Amendment or the statute, at least when a person is known and specified in the order.

This construction is fortified by the provision in Section 2517(5) to the effect that, when evidence of other crimes has been uncovered by authorized wiretapping, this evidence can properly be disclosed to other law enforcement officers pursuant to Section 2517(1) and (2). Section 2517(5) continues:

> Such contents and any evidence derived therefrom may be used under subsection (3) [for use at trial] . . . where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

Although the above language is not completely clear, it seems to indicate that the government should obtain a supplementary or new wiretap order when previous valid wiretaps afford grounds to surveil individuals who were not previously identified. The government apparently followed this procedure by adding new names in the order of January 15, 1971.

Only those whose rights were violated have standing to object, however, since the warrant was valid. See *United States* v. *Butenko*, 318 F. Supp. 66 (D.C. N.J. 1970), after remand of *Alderman* v. *United States*, 394 U.S. 165 (1969). The question of a defendant's standing to object is governed by Section 2518(10)(a) which provides that "any aggrieved person" may move to suppress. This language no doubt means any person whose conversation was overheard, not any third person who may have been implicated by the conversation. The Senate Judiciary Committee recognized this distinction by stating in its Committee Report that Section 2518(10)(a) would be read in connection with Sections 2515 and 2517. 1968 *U.S. Code Congressional and Administrative News*, Vol. 2, p. 2195.

With respect to Section 2515, the Senate Judiciary Committee said (*op cit.* p. 2185):

> The provision must, of course, be read in light of Section 2518(10)(a) [supra] . . . which defines the class entitled to make a motion to suppress. It largely reflects existing law. . . . There is, however, no intention to change the attenuation rule. See . . ., *Wong Sun* v. *United States*, 371 U.S. 471 (1963).

Thus, although *Alderman* had not yet been decided, Congress clearly intended to limit the phrase "aggrieved party" to one whose rights had been invaded, by citing *Wong Sun*. The Supreme Court also recognized this by dictum in *Alderman*, 394 U.S. at p. 175, f.n. 8 and 9.

Neither the Supreme Court nor any other court, so far as we know, has considered the bearing of

Section 2515 itself on this question. This section provides, in part:

> Whenever any wire or oral communications has been intercepted, no part of the contents of such communications and no evidence derived therefrom may be received in evidence in any trial, . . . if the disclosure of that information would be in violation of this chapter.

This language on its face seems to render all suppressed wiretaps inadmissible at trial if the "disclosure" would violate the wiretapping statute. The disclosure section concerning evidence admissible at trial is Section 2517(3) which merely refers to information received "by any means authorized by the statute." In other words, the Act itself leaves unanswered the question of whether evidence suppressed as to a defendant with standing is thereby suppressed for all parties by virtue of the language of Section 2515. To suppress for parties who lack standing would carry the provisions of Section 2515 far beyond "existing law" and eliminate the standing requirements of *Wong Sun* and *Alderman* insofar as wiretaps are concerned. If Section 2515 is meant to suppress as to all defendants at the trial, it could be circumvented by obtaining separate indictments or by severing those without standing, so that the evidence suppressed in one case would be usable in the other case. This refinement could cause as many as a dozen separate trials to result from an indictment such as the one in the case at bar, a useless and illogical result. It is for these reasons that we have construed Section 2515 *et seq.* to apply only to suppression at trial with respect to the aggrieved person, i.e. a defendant whose conversation had been

unlawfully tapped or on whose premises the unlawfully tapped telephone was located.

When the court authorized interception of wire communications in 70 C 3136, it also entered a separate order to permit a "pen register" on the telephones. This second order did not fulfill the requirements of Section 2518(3)(c) because it lacked a finding that normal investigative procedures would be unlikely to succeed. Since the first order contains sufficient authorization for a pen register, however, the second order of the same date is superfluous.

The motions to suppress the results of pen registers are granted to the same extent as granted above with respect to oral conversations and for the same reasons. An additional reason is that the court order allowed use of the pen register "until the telephone numbers . . . lead to the location and identity of Charles Bishop Smith's [et al.] confederates, accomplices and associates in the illegal schemes as aforesaid. . . ." A pen register in use when unknown persons were using the telephone would not reasonably be expected to lead to information covered by the foregoing language and is therefore not authorized by the court order.

A second series of wiretaps and pen registers were authorized pursuant to the Attorney General's memorandum of January 15, 1971. The order entered January 15, 1971 in case No. 71 C 127 named additional individuals and two identified only as "Pinky" also known as Lennie, and "Alvin," both last names unknown. The court believes that this is sufficient identification to satisfy Sections 2518(3)(a) and (4)(a), but that the authorization for "others as yet unknown" does not comply with the statute. Therefore the motions to suppress conversations and pen register recordings when the named persons were not

on the line is granted, as to defendants then on the telephone, et al.

Motions to suppress evidence arising from illegal wiretaps in other cases. Some or all of the wiretaps in the case at bar were the progeny of wiretaps found to be illegal by another judge of this court in *United States* v. *Smith, et al.*, 71 CR 852 (N.D.Ill. March 7, 1972), appeal pending. The *Smith* wiretaps were suppressed because they were not personally authorized by the Attorney General of the United States, following *United States* v. *Robinson, supra* p. 6.

The only defendants in the case at bar who have standing to complain about the wiretaps in *Smith* are those whose conversations were invaded in that case. *Alderman* v. *United States*, 394 U.S. 165 (1969). The government concedes this to be the situation with respect to defendants Norman Shabas and Jerome Leavitt, although contending that the *Smith* case was wrongly decided. We will abide by the decision in *Smith* for the purpose of these motions. Therefore the motions of Shabas and Jerome Leavitt to suppress wiretaps of their conversations are granted as to them. (Since Shabas was not mentioned in either order authorizing the wiretaps, his motion has already been granted on this additional ground).

Defendants whose rights were not personally invaded in *Smith* or herein, however, have no standing to complain about the wiretap evidence or the fruits of such evidence. *Alderman* v. *United States, supra* p. 8. Thus the motion to suppress by defendant Herbert Blitzstein and any others whose previous conversations were not illegally tapped is denied. For the same reason, the recordings of conversations in which Norman Shabas and Jerome Leavitt partici-

pated would be admissible evidence against any defendants who have no standing to complain of the violation of those rights.

Motion of defendant Weiss for production of Grand Jury minutes. This motion is denied. The defendants have been given a transcript of all of the recorded wiretaps to be used in this case, most of which were presumably submitted to the Grand Jury. If there was any further testimony before that body, a copy of the transcript will be produced after the witness has testified (if not sooner). 18 U.S.C. § 3500.

Defendant has shown no grounds for earlier production of the minutes. *James* v. *United States*, 416 F.2d 467 (8th Cir. 1969), *cert. den.* 397 U.S. 907 (1970).

Motion of defendant Weiss to produce evidence recovered by search and seizure. This motion has been complied with by the government's production of all wiretap transcripts. The government represents that no physical searches or seizures were made of defendant Weiss or his premises.

If the government obtained any evidence as the result of any wiretaps which have been held to illegal hereinabove, then such evidence is suppressed as to those defendants whose rights were invaded, unless the government demonstrates an independent ground for the searches. The record at this point does not indicate that there is any such evidence.

Motions of defendant Blitzstein and Weiss for production of statements, documents, physical evidence and list of witnesses. The government represents that it has complied with these motions to the extent stated in its memoranda. If at trial it should appear that the government did not produce any of the

materials which it now states it has produced, such unproduced materials will be suppressed as evidence. F.R.Cr.P. 16(g).

The motions are granted with respect to statements of co-defendants to the extent that they contain statements allegedly made by a moving defendant. Each defendant is entitled to copies of any statements allegedly made by him whether his statements were made to co-defendants, government agents, or prospective witnesses. F.R.Cr.P. 16(a)(1), 18 U.S.C. § 2518(8)(d).

The motions are granted with respect to any "deals" made with respect to favors and immunities and with respect to any other evidence favorable to a defendant. *Brady* v. *Maryland*, 373 U.S. 83 (1963).

The motions are denied with respect to a list of witnesses or prospective witnesses, criminal records of witnesses or prospective witnesses, publicity releases relating to this case, and "any irrelevant materials."

Motions for a bill of particulars by defendants Blitzstein, Goldman, Weiss, Rubin and Shapiro. The court believes that the defendants are entitled to know which particular gambling business they were allegedly engaged in, since it is conceivable that more than one such business was being conducted in the Northern District of Illinois between the dates specified in the indictment by one or more of the defendants. It is unlikely that there was more than one such business during this period of time which involved the persons charged in the indictment, however, if it is limited by the wiretap transcripts which have been disclosed. Nor is a defendant entitled to more particularization of his own position in the alleged gambling business. Since the government has

disclosed all of the wiretap transcripts, this should probably suffice as a bill of particulars.

Therefore the motions for a bill of particulars will be granted and considered complied with by the wiretap transcripts. The government may file further particulars if it deems this necessary or desirable to define the gambling business covered by the indictment and to lay the foundation for introduction of additional evidence at trial.

The other portions of the motions for a bill of particulars are denied, without prejudice to the defendants' rights to seek further particularization if the confines of the business are not made clear from the material produced or to be produced. Since, as mentioned, the court has not examined the transcripts of wiretaps, it will be up to the parties to determine whether they accomplish the objective of this part of the order.

Motion to sever by defendant Solkowitz, Weisman and Reed. The motion for severance is denied, without prejudice. Since it cannot be known at this time which defendants will actually be tried on the date set, the question of severance can be considered at the time of trial. The possibility that a co-defendant may testify, or that he may refuse to testify if called upon to do so by another defendant, is not grounds for severance. *United States* v. *Johnson*, 426 F.2d 1112 (7th Cir. 1970), *cert. den.* 400 U.S. 842 (1970). However, a severance will necessarily be granted to any defendant concerning whom the government takes an interlocutory appeal, and the government should also consider a separate trial for any defendant whose wiretapped conversations are suppressed but which the government intends to use against a co-defendant who lacks standing to object.

If any further motions or hearings are believed by any party to be necessary as a result of the rulings made hereinabove, they should be brought to the court's attention by notice and motion not later than the status report date of May 15, 1972. Any order which may be thought necessary to make the foregoing rulings more specific or related to specific defendants should be presented in the same manner.

The government is granted leave to return the original wiretapping authorizations to Washington.

ENTER:

THOMAS R. MCMILLEN
Judge, U.S. District Court

APPENDIX D

STATUTES INVOLVED

28 U.S.C. 510 provides:

> The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.

18 U.S.C. 2515 provides:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

18 U.S.C. 2516 provides, in pertinent part:

> (1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications * * *.
>
> * * * *

18 U.S.C. 2518 provides in pertinent part:

> (1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:
>
> (a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;
>
> * * * *
>
> (4) Each order authorizing or approving the interception of any wire or oral communication shall specify—
>
> * * * *
>
> (d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and
>
> * * * *
>
> (10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—
>
> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

* * * *

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FILE
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MICHAEL RODAK,

No. 72-1475

In the Supreme Court of the United States

OCTOBER TERM, 1972

UNITED STATES OF AMERICA,

Petitioner,

vs.

JACK ROBERTS, et al.,

Respondents.

MEMORANDUM IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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The Respondents, William G. Jackson and Henry Floyd Box, hereby file their memorandum in opposition to a petition for writ of certiorari.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is not yet reported but is reproduced in Appendix A of the Government's petition for writ of certiorari at Page 11.

JURISDICTION

The jurisdiction of the court is set forth in the Government's petition for writ of certiorari.

QUESTION PRESENTED

Whether the authorizations for applications and the applications for court orders to intercept certain telephone conversations complied with 18 U.S.C. §2516?

STATUTES INVOLVED

18 U.S.C. 2516(1) provides, in pertinent part:

> "(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communication * * *."

Title 18 U.S.C., Section 2518(1)(a) requires:

> "(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following performance:
>
> (a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;".

STATEMENT

The defendants in this case were indicted for conducting an illegal gambling business in violation of 18 U.S.C. §1955 and making interstate telephone calls in violation of 18 U.S.C. §1952. In each case, the defendants filed motions to suppress evidence obtained by wire interceptions under court orders. Those motions challenged the procedures by which the government processed the applications within the Department of Justice and the applications to the court for the interceptions. The basis of those challenges was the failure of the government to adhere to the statutory guidelines of 18 U.S.C. §2516. The District Court sustained the motions to suppress and the Seventh Circuit affirmed. (Appendix A, Government's Petition For A Writ of Certiorari, P. 11).

ARGUMENT

The government in its petition for a writ of certiorari points to the similarity of the issues in this case and *United States* v. *Giordano,* No. 72-1057, certiorari granted March 26, 1973. In doing so it relies on the reasoning set forth in the *Giordano* petition which alleges a conflict among the circuits.[1] We respectfully submit that no such conflict exists since the cases involved are factually distinguishable.

In making the argument concerning the alleged conflict in the circuits the government relies on the Second Circuit's opinions in *United States* v. *Pisacano,* 459 F.2d 259 (2nd Cir., 1972) petition for certiorari pending, No. 71-1410 and *United States* v. *Becker,* 461 F.2d 230 (2nd Cir., 1972) petition for certiorari pending, No. 72-158. The facts of those cases distinguish them from the instant case. The issue presented in *Pisacano,* as reflected by the government's brief in the Second Circuit and that court's opinion, was whether the defendants should be allowed to withdraw their pleas of guilty. In deciding that issue, the Court stated:

> "When the pleas were taken, no Court had yet determined that any defect existed in the authorization procedures, and, now that the procedures have been explained better than the Government did in Robinson *we are not at all sure that there was.*" (Emphasis added.)
>
> *United States* v. *Pisacano,* 459 F.2d 259, 264 (2nd Cir., 1972).

---

[1] See footnote three (3), page 5 of government's Petition for A Writ of Certiorari.

Although the Second Circuit of course considered the question of the authorization procedure of 18 U.S.C. §2516(1), it did not hold as a matter of law that the alleged authorizations in that case complied with Title 18 U.S.C. §2516(1), but limited their decision to the facts in that case. In fact, the Court only found that the affidavits concerning the authorization in *Pisacano* presented "a rather different picture from those before the Fifth Circuit in *Robinson.*" The Court's attention is directed to Footnote 5 in *United States* v. *Pisacano,* 459 F.2d 258, 264, (2nd Cir., 1972), petition for a writ of certiorari granted, wherein the Court stated, "having concluded that the Justice Department procedures were very likely consistent with the mandate of §2516(1) . . .", an indication that the authorization procedure was not dispositive of the case.

The situation in the instant case is quite different from that in *Pisacano.* In the instant case none of the authorizations were approved by the Attorney General or any specially designated Assistant Attorney General. Unlike *Pisacano* where two of the three authorizations were personally approved by the Attorney General, the authorizations in this case did not receive the attention of any of the individuals specified in 18 U.S.C. §2516(1). Also, none of the defendants in this case pleaded guilty. Although the Seventh Circuit adopted the reasoning of Judge Sobeloff in *Giordano,* 469 F.2d 522 (4th Cir., 1972) petition for certiorari granted, No. 72-1057, the opinion noted there were no authorizations by any of the individuals specified in the statute.

The Government argues that the Congressional purpose in requiring the authorization of the Attorney General (or an Assistant Attorney General specially designated by him) was not regarded as the safeguard for the privacy of citizens, but that that responsibility was placed in the neutral and detached authority of a Federal judge. This

statement and argument belies Congress's obvious intent to install a dual system of protection, namely the Judiciary *and the political process.* Each of the individuals statutorily authorized to approve an application under Title 18, §2516(1) are subject to that political process by Title 28 U.S.C. §503 and §506. Those Sections provide that the Attorney General and Assistant Attorney Generals are to be appointed by the President "by and with the advice and consent of the Senate". Thus, the Senate of the United States may continually insure that those individuals occupying those offices are individuals qualified in both intelligence and judgment to exercise the authority granted by Congress under Title 18 U.S.C. §2516(1). This purpose was obviously frustrated by the cavalier and insensitive procedure instituted by the Department of Justice in the procedure outlined in this case. This is evident by the Government's presumptuous statement that the Executive Assistant Sol Lindenbaum is the alter ego of the Attorney General who made "operative" wiretap decisions. If this individual was to occupy a position of such importance and judgment then the statutory requirement concerning the Department of Justice must be amended by Congress to require that he be appointed to that position "by and with the advice and consent of the Senate". Absent such an amendment, the statutes (T. 18 U.S.C. 2515(1) and T. 28 U.S.C. sections 503 and 506) place that responsibility in nine Assistant Attorney Generals and the language of 2516(1) should not be read to authorize someone other than those individuals identified in the statute to act. Congress made a conscious change in the language of the statute to confine the power to authorize an application instead of permitting any officer of the Department of

Justice or any United States Attorney designated by the Attorney General to authorize an application to the Court. Compare 87th Congress 1st Session S.1495 with the present text of the statute. *U. S.* v. *Tocarle,* 340 F.Supp. 1033 (D. Maryland, 1972).

If Congress sought to exercise political supervision over the wiretapping activities of the Attorney General and had questioned the Attorney General about his wiretap policies in this case, he would have been unable to answer the inquiries because he exercised no discretion in the case. Even if Mr. Lindenbaum knew what the Attorney General would do in the case, that knowledge does not transform Mr. Lindenbaum into the Attorney General. Furthermore, what was "operative" today may not be "operative" tomorrow.

If congress had intended that the Attorney General be allowed to delegate the power and responsibility to authorize wiretap applications then they would not have specifically limited the authorization to the "Attorney General of any Assistant Attorney General specially designated by the Attorney General." 18 U.S.C. §2516. Section 510 existed at the time the Omnibus Crime Control Act was passed. Rather than treating the words "Assistant Attorney General" in 18 U.S.C. 2516 as surplusage, that language should be given meaning, and the authority to approve wiretap applications should be limited to the officers specified in the statute.

The Government argues that the Attorney General's power to delegate his powers to authorize wiretap applications should be inferred from a reading of 18 U.S.C., Section 2510. The Government argues that the words "Attorney General" as used in another part of the Omni-

bus Crime Control Act—Title 18 U.S.C. Section 2514—relating to immunity has been held to permit any officer, employee, or agency of the Department of Justice to approve an application for immunity to a witness. However, 18 U.S.C., Section 2514 uses the words "Attorney General" without additional language to indi ate what Justice Department officers, if any, would be permitted to exercise that authority. Since the statute is silent on such a limitation or expansion of the Attorney General's powers, it is reasonable to conclude that anyone authorized by Title 28 U.S.C. Section 510 to act on behalf of the Attorney General would be permitted to approve an application for immunity. Such a construction is consistent with the statutory scheme outlined in the immunity statute where the initial determination to grant the witnesses immunity is made by a United States Attorney and that the determination is then subject to approval by the Attorney General. The need for these safeguards concerning the granting of immunity does not appear from the legislative history and the individual decisions to grant or withhold immunity rest largely in United States Attorneys scattered in Districts throughout the country. Under such a statutory scheme the personal attention of the Attorney General is not required. The analogy between the language in 18 U.S.C. Section 2514 and Section 2516 does not withstand close examination.

The Government also argues that Congress could have used express language to indicate that the function of the Attorney General may not be delegated citing Title 18 U.S.C. Section 245(a) (1). The pertinent part of that statute requires "the Attorney General or deputy Attorney General" to make a certification before a civil

rights prosecution is undertaken. The statute provides "which function of certification may not be delegated." (Govt. Br. p. 12; T. 18 U.S.C. Sec. 245(a) (1)).

18 U.S.C. Section 245(a) (1) purports to confine the exercise of prosecutorial discretion to the Attorney General or a deputy Attorney General. In the absence of such a limitation, any United States Attorney may, and normally would, exercise the prosecutorial discretion which has historically been placed in him. The language identifying two officers in the Justice Department (the Attorney General or the Deputy Attorney General) would not have been sufficient to limit this historical function. The express language was needed to place the prosecutorial discretion, previously held by local prosecutors, in the Attorney General or the Deputy Attorney General. On the other hand, the authority to initiate wiretaps was not previously exercised by any federal officers before the enactment of the Omnibus Crime Control Act.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN POWERS CROWLEY
Attorney for Respondents